IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEFF SCHMIDT, Plaintiff, v. AMERICAN INSTITUTE OF PHYSICS, Defendants.	)	Case No. 04-CV-3774 Judge Alexander Williams

DR. JEFF SCHMIDT'S CONFIDENTIAL SUPPLEMENTAL MEDIATION STATEMENT

SUBMITTED TO:

HAROLD HIMMELMAN

Respectfully Submitted,

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***** CONFIDENTIAL AND SUBJECT TO FED. R. EVID. 408 *****

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Plaintiff, Dr. Jeff Schmidt ("Plaintiff" or "Dr. Schmidt"), submits this confidential Supplemental Mediation Statement to further address the issues raised in his initial Confidential Mediation Statement as well as the issues raised during the parties' counsel-only June 22, 2005, pre-mediation session with Mr. Himmelman.

I. SETTLEMENT

At the parties' June 22, 2005 pre-mediation conference, the parties were encouraged to expand on their "Settlement Options" as stated in the initial Confidential Mediation Statements. Specifically, the parties were encouraged to perform a risk assessment of their cases to further define their settlement figures.

As stated in the Damages section (p. 14-15) of his initial Confidential Mediation Statement, Dr. Schmidt seeks – in addition to reinstatement – compensatory damages (including back and front-pay) and punitive damages. Dr. Schmidt's expert has calculated compensatory damages at $816,188.00, as stated with more particularity in Dr. McCarthy's Report (Exh. 6). In addition, Dr. Schmidt believes that punitive damages could exceed $1 million, or a total judgment in excess of $1,816,188.00.

Plaintiff is, of course, mindful of the inherent risks in litigation. Defendant has told Plaintiff that Defendant will file a Rule 56 motion with respect to some or all of his claims. As discussed in the initial Confidential Mediation Statement and during the parties June 22, 2005 pre-mediation conference, Plaintiff believes that he would defeat a summary judgment motion with respect to at least his Section 1981 and Title VII claims. Plaintiff is confident that there is substantial evidence at present to create a genuine issue of material fact as to whether the proffered reasons for his termination were pretextual.

As such, Dr. Schmidt is confident that his case will proceed to trial on at least the core civil rights claims. Plaintiff is also confident that further discovery – including depositions of AIP and its employees – as well as additional production of documents on critical topics that AIP has refused to produce to date, will only provide further factual support for his claims. Consequently, although Dr. Schmidt recognizes that the chances that all of his claims will survive summary judgment are small, as defense counsel admits, the Title VII and Section 1981 claims will provide Dr. Schmidt with the full

range of injunctive, compensatory, punitive and attorney's fees recovery. And as to these claims, Dr. Schmidt believes that Defendant's have virtually no chance of prevailing on summary judgment.

Given the state of discovery to date, Dr. Schmidt believes that he would have at least a 75% chance of success on liability and his basic damage claim when his core civil rights claims are presented at trial to a jury. Given this assessment, the risk-based value relating to his compensatory damages claims is $ 612,141.00 [$816,188.00 x 0.75]. A review of awards in discrimination/retaliation cases in Maryland, Virginia and the District of Columbia shows that this amount is within the range of awards in these types of cases. This number does not consider the expected increase in the chance of success beyond 75% due to further discovery. Moreover, we asses the likelihood of recovery of substantial punitive damages at 25% or an additional $250,000. Finally, the law requires the recovery of attorneys fees and costs for the prevailing party. Dr. Schmidt will be the prevailing party even if the only relief awarded is injunctive relief. We assess the likelihood of a finding of violation of the law by AIP at 85% and applying that percentage to estimated Howrey and Washington Lawyers Committee legal fees of $300,000 produces an additional recovery of $283,333. Thus Dr. Schmidt has a risk adjusted valuation of his case equal to $1,145,474.

Dr. Schmidt refers back to his initial Confidential Mediation Statement wherein he discussed a variety of settlement options that, in addition or in combination with a monetary component, could include some form of reinstatement and actions that increase diversity at AIP.

II. DIRECTED RESEARCH ON VARIOUS LEGAL ISSUES

At the parties' June 22, 2005 pre-mediation session, the parties were also directed to submit research results relating to various legal issues that had arisen during the session. The legal issues are:

- Would pre-judgment interest be awarded in the event of a verdict in favor of Dr. Schmidt?
- What is the standard for mitigation of damages; must a plaintiff seek and accept like or equivalent employment or any employment at all?
- Is the prevailing party entitled to costs?
- Is the EEOC's letter of determination admissible?

These issues are addressed below.

A. Prejudgment Interest Will Be Awarded in the Event of a Plaintiff's Verdict

Maryland district courts hold that "[c]onsistent with Title VII's purpose of making victims of discrimination whole, *the Court has the discretion to award prejudgment interest on any back pay award.*" *Ford v. Rigidply Rafters, Inc.*, 984 F. Supp. 386, 391 (D. Md. 1997) (holding that the amount of back pay was easily ascertainable) (emphasis added); *see also Grove v. Frostburg National Bank*, 549 F. Supp. 922, 948 (D. Md. 1982) ("Prejudgment interest on back pay awards may be awarded in Title VII cases, in the court's discretion").

There does not appear to be a set method for how the Maryland federal courts have calculated the interest on a back pay award. In *Ford*, the court compounded the total amount of back pay and used an interest rate corresponding to the average rate of inflation for that time period – in this case, 3%. 984 F. Supp at 391, *see also Munday v. Waste Management of North America, Inc.*, 997 F. Supp. 681, 686 (D. Md. 1998) (using the same formula as *Ford* to arrive at an interest rate of 4%). However, in *Grove* the court seemed to use Maryland's statutory rate of interest of 6 %. 549 F. Supp. at 948; *see also Local 2P, Lithographers & Photoengravers Int'l Union*, 412 F. Supp. at 542 (awarding prejudgment interest at 6% per annum). *See generally* MD. Constitution, Art. 3 §57 ("The Legal Rate of Interest shall be Six per cent. per annum...").

B. Mitigation of Damages: A Plaintiff is Required to Seek and Accept Substantially Equivalent Employment

The duty to mitigate damages requires that the terminated employee be reasonably diligent in seeking and accepting new employment substantially equivalent to that from which he was discharged. *See Xiao-Yue Gu v. Hughes STX Corp.*, 127 F. Supp.2d 751, 759 (D. Md. 2001) (*citing Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1273 (4th Cir. 1985)). In *Hughes STX Corp*, the Maryland District Court stated that it is clear that a claimant "need not go into another line of work, accept a demotion, or take a demeaning position" in order to fulfill his duty to mitigate damages. *Id.* at 759-60 (*quoting Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982)).

The plaintiff in *Xiao-Yue Gu* had worked as a senior scientist for the defendant prior to her termination. *Id.* at 760. The court held that the duty to mitigate did not compel the plaintiff to seek positions as a computer programmer or "just any job listed in the local wanted ads under the rubric of "Professionals." *Id.* The court found that the plaintiff has fulfilled her duty to mitigate damages by contacting multiple employment agencies, applying to a number of employers on a regular basis, and ultimately relocating to another state in order to obtain two part-time teaching jobs. *Id.* The court noted that even after obtaining lower paying employment, the plaintiff continued to apply for positions commensurate with her qualifications and skills. *Id.*

Maryland does not have a pattern jury instruction regarding mitigation of damages in an employment context. The Modern Federal Jury Instructions (which the 5th, 8th, 9th, and 11th Circuits follow) have the following general mitigation of damages instruction:

> You are instructed that any person who claims damages as a result of an alleged wrongful act of another has a duty under the law to use reasonable diligence under the circumstances to "mitigate," or minimize, those damages. The law imposes on an injured person the duty to take advantage of reasonable opportunities he may have to prevent the aggravation of his injuries, so as to reduce or minimize the loss or damage.
>
> If you find the defendant is liable and that the plaintiff has suffered damages, the plaintiff may not recover for any item of damage he could have avoided through such reasonable effort. If the plaintiff unreasonably failed to take advantage of an opportunity to lessen his damages, you should deny recovery for those damages which he would have avoided had he taken advantage of the opportunity.
>
> Bear in mind that the question whether the plaintiff acted "reasonably" with respect to the mitigation of damages is one for you to decide, as sole judges of the facts. Although the law will not allow an injured plaintiff to sit idly by when presented with an opportunity to mitigate, this does not imply that the law requires an injured plaintiff to exert himself unreasonably or incur unreasonable expense in an effort to mitigate, and it is defendant's burden of proving that the damages reasonably could have been avoided. In deciding whether to reduce plaintiff's damages due to some failure to mitigate, therefore, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the defendant has satisfied his burden of proving that the plaintiff's conduct was not reasonable.

Instruction 77-7 Mitigation of Damages

C. The Prevailing Party Is Entitled to Costs

Rule 54(d)(1) of the Federal Rules of Civil Procedure states, "*costs* other than attorney's fees *shall be allowed as of course to the prevailing party* unless the court otherwise directs..." Fed. R. Civ. P. 54(d)(1) (emphasis added).

Maryland federal cases have held that the prevailing party is entitled to its costs. *See Equal Employment Opportunity Comm'n v. Local 2p, Lithographers & Photoengravers Int'l Union*, 412 F. Supp. 530, 542 (D. Md. 1976) (permitting the award of costs to the prevailing party in a Title VII case); *Glassman Constr. Co., Inc v. Maryland City Plaza*, 371 F. Supp. 1154, 1162 (D. Md. 1974) ("Federal rule 54(d) would be applicable in this action, and, therefore, plaintiff, as the prevailing party, would be entitled to its costs"). In fact, in *Tillman v. Wheaton-Haven Recreation Assoc., Inc.*, 508 F.2d 1222, 1230 (4th Cir. 1978), the Fourth Circuit reversed the Maryland district court's decision to deny costs to the prevailing party in a Title VII case.

D. Admissibility of the EEOC's Determinations Is Within District Court's Discretion

The Fourth Circuit holds that the decision of whether or not to admit into evidence the EEOC letter of determination is within the discretion of the district court.[1] *Cox v. Babcock & Wilcox Co.*, 471 F.2d 13, 15 (4th Cir. 1972); *Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 n.4 (4th Cir. 1988). The district court must look to Fed.R.Evid. 403 and determine whether the letter's "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Fed.R.Evid.* 403 (2005). Other courts have excluded EEOC determinations. *See Hall v. United States*, 988 F.2d 1050 (10th Cir. 1993)(finding no abuse of discretion when the court excluded an

[1] As a public record or report, the EEOC letter of determination qualifies as an exception to the hearsay rule. *See* Fed.R.Evid. 803(8)(C). Dr. Schmidt received a letter of determination from the EEOC stating that the EEOC finds that AIP's decision to terminate Dr. Schmidt's employment was not based on unlawful, discriminatory reasons. The Supreme Court has ruled that administrative findings with respect to claims of racial discrimination fit within Rule 803(8)(C). *Chandler v. Roudebush*, 425 U.S. 840, 863 n.39 (1976). Thus, the EEOC letter of determination clears the initial hurdle of admissibility under Rule 803(8)(C).

EEOC determination on the grounds that "the only purpose to be served by admitting into evidence the ... report would be to suggest to the jury that it should reach the same conclusion, ... the risk of unfair prejudice to the plaintiff substantially outweighs any relevance")(citation omitted); *Johnson v. Yellow Freight System Inc.*, 734 F.2d 1304, 1309 (8th Cir. 1984)(finding that the time defendant would spend exposing weaknesses in the EEOC report would unduly add to the length of the trial); *Walker v. Nationsbank of Florida*, 53 F.3d 1548 (11th Cir. 1995)(finding no abuse of discretion when the court excluded conflicting EEOC determinations due to the danger of confusion); *Hairston v. Washington Metro. Area Transit Auth.*, 1997 U.S. Dist. LEXIS 5188 at *11-12 (D.D.C. April 10, 1997)(excluding EEOC determination as being unfairly prejudicial and a waste of time because the letter contained nothing other than conflicting allegations and legal conclusions).

Plaintiff will argue that the EEOC letter of determination sent to Dr. Schmidt should be excluded because, if admitted, it would be unfairly prejudicial, cumulative and waste the court's time. The letter reaches a legal conclusion that AIP's decision to terminate Dr. Schmidt's employment was not based on discriminatory reasons and simply restates certain of the conflicting allegations without investigating the credibility of those allegations. The legal standard for liability under the claims alleged in Dr. Schmidt's Complaint are different than that applied by the EEOC, and therefore the determination made, like the legal standards, are inapposite. Moreover, Dr. Schmidt would be forced to spend court time exposing the weaknesses and inaccuracies contained in the determination to limit its effect on the jury, thus wasting court time. Lastly, the letter of determination would be cumulative because the parties will need to present the information and allegations contained in the letter to the jury during the trial. For the above stated reasons, the EEOC letter of determination is likely to be excluded from evidence.

III. ASSESSMENT OF WITNESS' CREDIBILITY

At the parties' June 22, 2005, pre-mediation session, the parties were also directed to assess the credibility of witnesses likely to be deposed and/or called at trial. As stated during the pre-mediation conference, Dr. Schmidt cannot accurately predict the credibility of AIP witnesses without having had the opportunity to depose any of their witnesses or to receive and review all relevant documents authored

by or relating to them. Despite this substantial deficiency of information, Dr. Schmidt provides the following assessment of likely AIP witnesses. Dr. Schmidt anticipates that each of the AIP witnesses below will testify to the effect that his termination was lawful and not pretextual in retaliation for his protected activity. Thus, it bears noting generally for each of the following witnesses that Dr. Schmidt believes that documents produced to date that are inconsistent with AIP's expected theme will undermine the credibility of the witnesses' testimony regarding his alleged lawful firing.

- Stephen G. Benka – Assuming that Mr. Benka would testify that Dr. Schmidt's firing was not pretextual – Dr. Schmidt believes that documents showing Mr. Benka's successful efforts to lower Dr. Schmidt's performance ratings as a result of his "disruptive" behavior will substantially undermine his credibility.

- Theresa Braun – Human Resources Director at AIP. Despite internal regulations requiring same, documents show (1) no investigation of when the book *Disciplined Minds* was written or if the statement that the book was written in part on "stolen" time was true; and (2) that AIP failed to follow its stated termination procedures with Dr. Schmidt's termination. Because of the conflict between AIP's written policy and the actual method used to terminate Plaintiff's employment, Dr. Schmidt believes that Ms. Braun's credibility will be undermined.

- James Stith – AIP executive. Dr. Stith's refusal to change even a word of an unfair performance review given Dr. Schmidt undermines his credibility.

In addition to the foregoing AIP witnesses, the following potential witnesses are likely to be deposed by or called at trial as witnesses by either party.

- Jean Kumagai – former *Physics Today* employee and coworker who, at the time, was the only minority employee and who, with Dr. Schmidt, successfully pressured AIP to increase her salary by 25% to the levels of non-minority employees. Ms. Kumagai is also familiar with Dr. Schmidt's complaints regarding AIP's discriminatory hiring practices and AIP's negative and retaliatory responses to those complaints. Ms. Kumagai has been interviewed and is very intelligent and articulate and has knowledge of virtually all of the issues alleged in Plaintiff's Complaint. She is expected to be a solid and credible witness.

- Paul Elliott – former *Physics Today* employee and coworker who worked with Plaintiff, has knowledge of his work and is believed to have general

knowledge of the workplace issues raised by Plaintiff as detailed in the Complaint, including, but not limited to, AIP's implementation of a ban on private conversations in the workplace. Mr. Elliott is a sympathetic witness who is intelligent and articulate and will likely prove to be a solid and credible witness.

- William Sweet – former *Physics Today* employee and coworker with knowledge of Plaintiff's work and general knowledge of the workplace issues raised by Plaintiff as detailed in the Complaint and the policy and/or practice of outside writing at AIP. Dr. Schmidt believes that Mr. Sweet would be a credible witness relative to, among other things, AIP's willingness to permit outside writings and the use of AIP resources to do so.

- Alexander Hellemans – former *Physics Today* employee and coworker with knowledge of Plaintiff's work and the AIP policy and/or practice of permitting outside writing and use of AIP resources to do so by employees other than Dr. Schmidt. Dr. Schmidt believes that Mr. Hellermans will credibly testify to the above issues.

- Christopher Mohr – former *Physics Today* employee and coworker with knowledge of Plaintiff's work, the workplace issues raised by Plaintiff as detailed in the Complaint and the AIP policy and/or practice of permitting outside writing and use of AIP resources to do so by employees other than Dr. Schmidt. Dr. Schmidt believes that Mr. Mohr will credibly testify to the above issues.